It is further suggested that as this Court held in *Bollenbach v. United States*, 326 U.S. 607, 613, 90 L.Ed. 350, 355:

"conviction ought not to rest on an equivocal direction to the jury."

The protective instructions in the case at bar, when contrasted to the trial court's denial of motions to strike, are at best equivocal.

The Petitioner submits that his sentence and conviction were obtained in violation of his rights to confrontation, cross-examination and a fair trial by jury, and therefore should be set aside.

## CONCLUSION

For the foregoing reasons, the Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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*Attorney for Petitioner.*

March, 1970

## APPENDIX

APPENDIX "A"

In the

# United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1969 SEPTEMBER SESSION, 1969

No. 17494

ALBERT ROVIARO,

*Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JANUARY 5, 1970

Before CASTLE, *Chief Circuit Judge,* SWYGERT, CIRCUIT *Judge,* and GORDON, *District Judge.*

GORDON, *District Judge.*[1] The appellant, Albert Roviaro, was convicted of violating 21 U.S.C. §174, which deals with conspiracy under the narcotics laws. An appeal from the conviction has previously been decided adversely to

[1] The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

the defendant. *United States* v. *Roviaro,* 379 F.2d 911 (7th Cir. 1967). Mr. Roviaro then sought relief under 28 U.S.C. §2255, and the present appeal is taken from the trial court's denial of his §2255 motion. He alleges that his constitutional rights under the fourth and sixth amendments were violated.

Conversations between the defendant and a government informer, who wore a Kel-set transmitter taped to his body, were monitored by a federal agent. Over the defendant's objections, these conversations were admitted into evidence. The defendant's reliance on *United States* v. *White,* 405 F.2d 838 (7th Cir. 1969), cert. granted 394 U. S. 957 (1969), is misplaced. In *United States* v. *Teller,* 412 F.2d 374 (7th Cir. 1969), we recognized that *White* could not be retroactive beyond December 18, 1967 for the reason that *White* relied upon *Katz* v. *United States,* 389 U.S. 347 (1967), and the date of the *Katz* opinion, December 18, 1967, was set by the supreme court as the retroactive limit of the rule in *Katz* in the court's subsequent decision in *Desist* v. *United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed. 2d 248 (1969). Since the Kel-set transmitter in the instant case was not used after May 4, 1963, this court must apply the "trespass" theory of *On Lee* v. *United States,* 343 U.S. 747 (1952). We find that no trespass was committed under the facts of the case at bar.

The defendant argues that the introduction into evidence of a telephone conversation between the defendant and the same government informer was error. A federal agent listened to the conversation over the shoulder of the informer, with the latter's permission, and repeated the

conversation in court. This practice was specifically approved in *United States* v. *Martin,* 372 F.2d 63 (7th Cir. 1967).

Challenge to the conviction under the sixth amendment is based on *Bruton* v. *United States,* 391 U.S. 123 (1968), where the court held the admission of an out of court statement by a co-defendant, inculpating Bruton, was reversible error. The indictment in the case at bar charged Mr. Roviaro with conspiring with eleven other persons. Three of those eleven were named as co-defendants. Of those three, one was acquitted, another had the indictment against him dismissed, and the third man's case ended with a hung jury; only Mr. Roviaro was convicted. The appellant argues that evidence involving his co-defendants must have been improperly used against him, but we do not find this claim impressive. The jury may have believed that Mr. Roviaro conspired with one or more of the eight alleged conspirators who were not indicted.

There are no allegations before us as to what specific evidence was prejudicial to the defendant other than some statements by two addicts describing drug addiction to the jury. In *Bruton* and the cases which have applied its doctrine, there were extra-judicial statements which clearly inculpated another defendant. See *Serio* v. *United States,* 401 F.2d 989 (D.C. Cir. 1968); *Johnson* v. *Yeager,* 399 F.2d 508 (3rd Cir. 1968); *United States* v. *Lyon,* 397 F.2d 505 (7th Cir. 1968). No such showing has been made here by Mr. Roviaro.

In his jury instructions, the trial judge carefully explained which statements could be applied to which defendants. There is no reason to believe that the jury did not

understand and heed his instructions since they acquitted one defendant, convicted another, and split their vote as to the other; this is a striking indication that the jury did not apply all the evidence to all the defendants. We conclude that there was no denial of sixth amendment rights.

The district court's denial of the §2255 motion is therefore affirmed.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALBERT ROVIARO, #84175,,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

68 C 1092

OPINION
(Filed February 17, 1969)

Petitioner is presently incarcerated in the Federal Correctional Institution at Leavenworth, Kansas. He was sentenced by this Court on March 22, 1966, after a jury found him guilty on each count of a three count indictment. The first count charged petitioner with conspiring to import and bring narcotic drugs into the United States and to receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of such narcotic drugs violation of Section 174 of Title 21 of the United States Code. The second and third counts charged petitioner with unlawful and knowing use of a communications facility, i.e., a telephone, in committing and causing and facilitating the commission of, and in attempting to commit, a criminal offense in violation of Section 1403 of Title 18 of the

United States Code. A ten year sentence was imposed on the first count and five year sentences were imposed on the other counts, these sentences to run concurrently.

Petitioner's conviction was affirmed on appeal. *United States* v. *Roviaro,* 379 F.2d 911 (7th Cir. 1967). On November 1, 1967, on motion of petitioner, the sentences were modified by this Court: the sentence on the first count was reduced to five years and the five year sentences on the second and third counts were conditioned to run consecutive to the sentence on the first count but concurrent with each other.

Petitioner presently seeks to have these sentences vacated and set aside under the provisions of Section 2255 of Title 28, United States Code. He contends that his conviction is vitiated by the admission, over his specific objection, of certain evidence obtained in violation of his rights under the Fourth Amendment to the Constitution of the United States. This evidence consisted of the testimony of certain government agents relating to incriminating statements made by petitioner in various conversations with a government informer, which the agents overheard by means of electronic eavesdropping . Petitioner further alleges that his conviction was obtained in violation of his rights of cross-examination and confrontation of witnesses as secured by the Sixth Amendment. He also argues that the Court's denial of his motion for severance allowed the government to put substantial prejudicial testimony into evidence which would have been inadmissible if he had been granted a separate trial. The respondent has moved to dismiss.

At the trial, Fred Drake, a government informer, testified to the substance of a number of transactions and conversations with the petitioner involving the sale of quanti-

ties of narcotic drugs. Drake also testified to the substance of a number of telephone conversations which he had with petitioner concerning the sale of narcotics. As part of his testimony, Drake specified certain of these telephone conversations which he permitted Edward Cass, a federal narcotic agent, physically to overhear. Drake further stated that on two occasions, February 15, 1963 and May 4, 1963, he wore a small radio transmitter, attached to his person by government agents, during meetings with petitioner.

Following Drake's testimony, the government called three federal narcotics agents who testified to the conversations which are presently in question. Edward Cass testified to the telephone conversations he physically overheard between Drake and petitioner. Agent Cass also testified to a conversation between Drake and petitioner in a restaurant on February 15, 1963, which he had overheard on a radio receiver. Agent Bernard Theisen testified to a conversation between Drake and the petitioner which occurred in Drake's car also on February 15, and a conversation between Drake and petitioner later that day at a restaurant. Agent Theisen overheard these conversations by means of a radio receiver. Agent Robert A. Waltz testified to conversations at a subsequent meeting between Drake and petitioner in a restaurant on May 4, 1963. The informer again wore a secret radio transmitter, and agent Waltz overheard the conversations through a radio receiver. In none of the above instances did the agents obtain a search warrant or court order authorizing the eavesdropping.

In support of his contention that the admission of this testimony was in violation of the Fourth Amendment, petitioner relies on *Katz* v. *United States*, 389 U.S. 347 (1967) and the recent decisions of *United States* v. *White*, Nos. 16021-16022 (7th Cir., filed Jan. 7, 1969), and *United States* v. *Waller*, No. 16426 (7th Cir., filed Jan. 31, 1969).

The *Katz* case is the most recent Supreme Court decision dealing with the admissibility of electronically obtained eavesdrop evidence. In *Katz,* agents of the Federal Bureau of Investigation, having probable cause and acting in a carefully restricted manner but without prior judicial approval, placed an electronic listening and recording device outside a public telephone booth and intercepted telephone conversations which the defendant made from the booth to others without the knowledge or consent of the defendant or any of the parties to the conversations. Reversing the conviction, the Supreme Court held that the interception of the conversations by such covert electronic surveillance constituted an unlawful seizure in violation of the defendant's fourth amendment rights, and that the admission of the conversations was therefore improper. The Supreme Court's decision was based on the lack of a search warrant or prior judicial authorization for the interception of the conversations. Under the circumstances, antecedent jusification before a magistrate was deemed essential to insure proper protection of the defendant's fourth amendment guarantees.

In the *White* case, the Court of Appeals for the Seventh Circuit held that the principles announced in the *Katz* decision were equally applicable to a situation where private conversations between individuals were monitored by government agents with the consent of one of the participants. *White* involved the following facts. Agents of the Federal Bureau of Narcotics, acting without a search warrant or prior judicial approval, placed a miniature radio transmitter on the government informer prior to his conversations with the defendant. The agents were able to overhear certain conversations between the informer and the defendant without defendant's knowledge through radio receivers.

The informer did not testify at the trial, but testimony by the narcotics agents recapitulating these conversations was admitted. On appeal, this testimony was held to be inadmissible and defendant's conviction was reversed.

The decision of the Court of Appeals was based on two general principles, stated in the *Katz* opinion. The first of these is "that the fourth amendment is designed to preserve privacy against the 'uninvited ear' of government and must be applied to 'protect people, not places.'" *United States* v. *White,* Nos. 16021-16022, at 7 (7th Cir., filed Jan. 7, 1969). The second is "that conversations are within the scope of the fourth amendment's protection. . . . *Id.* at 7. In light of these principles, the Court found that the factual differences between the *Katz* and *White* situations were not legally significant, stating,

> It is our opinion . . . that the surreptitious placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in *Katz.* Each act was part of a "bugging" technique by which a conversation was transmitted to an "uninvited ear"—government agents. The crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker. *Id.* at 7-8.

The Court of Appeals then concluded that the failure of the agents to secure prior judicial approval for the interception of the defendant's conversations rendered the content of these conversations "per se inadmissible evidence." *Id.* at 8-9.

Petitioner, relying on *White,* submits that since the conversations in question in the instant case were monitored by the agents without prior judicial authorization, the

testimony of the agents relating to these conversations was, likewise, inadmissible. However, in *White* the Court of Appeals noted at least two exceptions to the "per se rule" which are relevant to the propriety of the admission of the testimony in question.

The first of these exceptions was outlined in *Rathbun* v. *United States,* 355 U.S. 107 (1957). In *Rathbun,* the Court determined that each party to a telephone conversation has constructive knowledge and bears the risk that the other party may have an extension line and may allow another to overhear the conversation. *See, also, Williams* v. *United States,* 311 F.2d 721, 725 (7th Cir.), *cert. denied,* 375 U.S. 812 (1963). In such circumstances, the interception of the speaker's conversation by an uninvited third party, with or without the complicity of the intended listener, could have been anticipated by the speaker and he cannot complain of a violation of his right to privacy. Consequently, his statements are admissible as evidence against him. See *United States* v. *White,* Nos. 16021-16022, at 10-11, 13 (7th Cir., filed Jan. 7, 1969).

This exception is applicable to a substantial portion of the testimony of agent Cass at petitioner's trial. All but one of the telephone conversations overheard by agent Cass were received by the informer either at his home or the agent's office. The record discloses no extraordinary precautions by petitioner to guard the privacy of these conversations. The circumstances of these conversations was such that petitioner assumed the risk that his statements might be overheard by a third party on an extension. Accordingly, the interception of these conversations by Cass cannot be deemed an unreasonable seizure within the meaning of the Fourth Amendment and the testimony of agent Cass as to their content was properly admitted.

The only remaining conversation which was overheard by agent Cass, was received by the informer at a public telephone booth. Prior to this conversation, particular arrangements regarding the time and place of this telephone call were made between petitioner and the informer. These arrangements were designed to guard the privacy of this conversation and petitioner could not have justifiably anticipated that it would be overheard by a third party.

In this regard, a second "exception," which was noted in the *White* opinion, is pertinent. This exception is illustrated by *Lopez* v. *United States,* 373 U.S. 427 (1963). In *Lopez* a concealed device on the person of an undercover agent recorded a conversation between him and the defendant. Admission in evidence of the recording itself to corroborate the undercover agent's testimony was upheld by the Supreme Court of the United States. Thus, the *Lopez* decision indicates that where an informer testifies as to conversations with a defendant, a recording of such conversations is admissible for the limited purpose of corroboration. See *United States* v. *Waller,* No. 16426 (7th Cir., filed Jan. 31, 1969); *United States* v. *White,* Nos. 16021-16022, at 13 (7th Cir., filed Jan. 7, 1969).

Under this rationale, the telephone conversation in question was clearly admissible. Indeed, under *Lopez,* all or substantially all of the eavesdrop evidence presently in question would appear to be admissible. Prior to the testimony of any of the eavesdropping agents, Drake appeared and testified at length to the various conversations which were overheard by the agents. The subsequent testimony of the agents did not substantially expand or modify the testimony of Drake but tended only to affirm or corroborate the content of the conversations as related by

him. The fact that *oral* testimony, rather than a recording, was offered to corroborate the informer's testimony would not appear to distinguish *Lopez.* Petitioner was free to challenge the credibility of the agents, as well as the informer. Indeed, such oral testimony is more susceptible to impeachment than a recording.

Petitioner points out, however, that agent Theisen testified to a conversation that was not testified to by Drake. He submits that the admission of this testimony requires the vacation of his conviction, citing *United States* v. *Waller,* No. 16426 (7th Cir., filed Jan. 31, 1969).

The *Waller* decision has several factual features which distinguish it from the present case. In *Waller,* a federal narcotics agent testified to a conversation between the defendant and a government informer, which he overheard by means of an electronic eavesdropping device. The informer, although present during the trial, did not testify. In reversing the defendant's conviction, the Court of Appeals for the Seventh Circuit held that the admission of the agent's testimony was improper because it allowed the government to substitute evidence obtained by electronic eavesdropping for the testimony of the informer.

The important distinction between the instant case and *Waller* is that in this case, with one exception, the informer actually testified to the conversations in question. The sole exception was a conversation which occurred while petitioner and Drake were driving to O'Hare Airport in the latter's car. At the trial, Drake testified to having made this trip and explained the circumstances which occasioned the trip. The testimony of agent Theisen, therefore, was within the general scope of the testimony of the informer. Certainly, the instant case does not present a situation in which the government sought to con-

ceal substantial factual and legal issues through the introduction of eavesdrop evidence. *See Lopez* v. *United States,* 373 U.S. 427, 441-46 (1963) (concurring opinion).

Even assuming that the admission of this testimony by agent Theisen was improper, the error cannot be said to require the vacation of the conviction. Agent Theisen testified that he heard petitioner tell Drake "about his associations with Drake's father in the old days." This was the entire substance of the testimony concerning the conversation between petitioner and Drake. It is obvious that the content of this conversation was insubstantial and that it was not prejudicial to the defendant. The admission of his evidence, therefore, can at most be regarded as harmless error.

One further point needs to be made in regard to all the challenged eavesdrop evidence. The exclusion of this evidence ultimately depends on whether or not the principles announced in *Katz* v. *United States,* 389 U.S. 347 (1967), upon which the *White* decision was based, are to be applied retroactively. Petitioner's conviction was affirmed by the Court of Appeals on June 28, 1967. A rehearing was denied on August 24, 1967. The *Katz* case was not decided until almost three months later, on December 18, 1967. Prior to *Katz,* evidence obtained by means of electronic eavesdropping without a search warrant, had been held admissible in *On Lee* v. *United States,* 343 U.S. 747 (1952). Thus, if the *Katz* decision is not retroactive, the disposition of the instant case is controlled by *On Lee. See United States* v. *White,* Nos. 16021-16022, at 13 (7th Cir., filed Jan. 9, 1969).

The Supreme Court has indicated in recent cases that the retroactivity of any particular rule depends primarily on the purpose of the constitutional guarantee involved.

If there is an abridgement of a right which affects " 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent,' " the claim can be asserted retroactively. *See Johnson* v. *New Jersey,* 384 U.S. 719, 727-28 (1966). On the other hand, if the constitutional right relates to values and objectives other than that of a fair trial the violation of the right cannot be asserted retroactively. *See Tehan* v. *Shott,* 382 U.S. 406 (1966); *Linkletter* v. *Walker,* 381 U.S. 618 (1965).

*Katz* would appear to fall within the latter category. It announces an exclusionary rule which is similar to that announced in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The *Mapp* rule, which excluded evidence obtained in an unreasonable search or seizure, was not applied retroactively in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), because exclusion of such evidence was calculated "to deter the lawless action of the police and to effectively enforce the Fourth Amendment." *Id.* at 637. Further, retroactive application of the rule was deemed unnecessary because illegally seized evidence in itself did not tend to affect the fairness of the trial. *See id.* at 637-38.

Substantially the same reasoning is applicable to the rule in *Katz.* It is clear that the exclusion of the recording in *Katz* was intended to encourage police to obtain prior judicial approval for such electronic surveillance. *See* 389 U.S. at 354-59. As in *Mapp,* the purpose of exclusion of the evidence is to prevent police violation of the privacy of individuals and to vindicate the guarantee of the Fourth Amendment. Moreover, the integrity of the fact-finding process is not affected by the manner in which the conversations of the defendant are intercepted. The credence which may properly be given eavesdrop evidence is the same as that which may be given tangible evidence in a

traditional search and seizure case. In addition, *On Lee* has been relied upon by law enforcement officers and been the basis of numerous decisions in the past years. Retroactive application of *Katz* would require reconsideration of literally thousands of cases. The effect this would have on the administration of justice is obvious. In light of these considerations, this Court cannot conclude that *Katz* requires retroactive application.

Petitioner also contends that his right to cross-examination and confrontation of witnesses guaranteed to him by the Sixth Amendment has been violated by this Court's denial of his motion for severance. He argues that through denial of this motion, he was convicted by prejudicial evidence improperly admitted. In making this contention, petitioner relies primarily on the recent decision of the Supreme Court of the United States in *Bruton* v. *United States,* 391 U.S. 123 (1968).

In *Roberts* v. *Russell,* 392 U.S. 293 (1968) the Supreme Court held that *Bruton* is to be applied retroactively and summarized its holding in *Bruton* by stating,

> In *Bruton* v. *United States,* 391 U.S. 123, decided May 20, 1968, we overruled *Delli Paoli* v. *United States,* 352 U.S. 232, and held that, despite instructions to the jury to disregard the implicating statements in determining the co-defendant's guilt or innocence, admissions at a joint trial of a defendant's extrajudicial confession implicating a co-defendant violated the co-defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. This case presents the question whether *Bruton* is to be applied retroactively. We hold that it is. *Id.* at 293.

The government insists that *Bruton* stands only for the proposition that a defendant's right to confrontation is violated where an extrajudicial confession of his co-defendant is introduced at their joint trial. In reply, petitioner calls attention to cases subsequent to *Bruton* which may read the confrontation rationale of *Bruton* to apply in cases where the particular item of evidence in question is not an inculpatory extrajudicial confession.

Nevertheless, although the fundamental concern of *Bruton* is the right of confrontation, the focus in *Bruton* on the inculpatory extrajudicial confession demonstrates that there must at least be a showing of substantial prejudice before severance will be constitutionally required. In the instant case, petitioner has not shown that any prejudice resulted from denial of the motion for severance. He mentions the admission of some testimony describing details of the purchase and use of narcotics, but this testimony does not by any means involve the possible prejudice upon which a Sixth Amendment claim of right must be based. Furthermore, although it should not be assumed that prejudicial effects will be overcome by protective instructions to the jury, *Bruton* v. *United States*, 391 U.S 123, 129 (1968), it should be noted that the following protective instruction *was* given in this case:

> Let me now explain to the ladies and gentlemen of the jury. Any time you have multiple defendants, whether in a conspiracy trial or even though they are not charged in a conspiracy, but just charged with different or separate and similar acts, the jury must understand that under our system of law you may take into consideration with respect to any one defendant only things which he said or did.
>
> Therefore any testimony about a conversation with Mr. Sandsbury is applicable only to Mr. Sandsbury, and is not applicable to Mr. Anderson, to Mr. Roviaro or to Mr. Capko.

> There is one exception to that general principle, and that is that if you find, if you ever do, if you find that there was a conspiracy and you conclude from the evidence as it applies to a particular individual that he was a member of that conspiracy, then you may take into consideration with respect to that individual the acts of other individuals who you find are members of that conspiracy. Record at 123.

Petitioner also contends that prejudice is apparent in this case because there was disagreement among the jurors as to the guilt of one defendant, Walter Anderson, and a mistrial was declared as to Anderson, while petitioner was, on the other hand, found guilty by the jury. He maintains that the action by the jury shows that some or one of the jurors must have considered Walter Anderson to be guilty and must have considered evidence concerning Walter Anderson incriminating as to petitioner.

But as the Court of Appeals pointed out on direct appeal of this case,

> The jury's acquittal verdict evinced its conclusion that defendant had not conspired with John Capko. Despite its disagreement with respect to Walter Anderson's guilt, the jury could have concluded that defendant conspired with some of the other nine co-conspirators named in Count One of the indictment and possibly with Walter Anderson. Certainly Fred Drake's testimony could cause the jury to conclude that he had conspired with defendant before becoming a government informer. This is enough to support defendant's conviction. *United States* v. *Roviaro,* 379 F.2d 911, 914 (7th Cir., 1967).

Contrary to what petitioner contends, the subsequent decision in *Bruton* does not by any means affect the logic or import of this statement by the Court of Appeals.

Finally, petitioner contends that his right to confrontation was violated by admission into evidence of acts and statements of an alleged unindicted co-conspirator who was dead at the time of petitioner's trial. But the cases establish that it is permissible to introduce evidence based on the activities of a deceased co-conspirator so long as they are in furtherance of the conspiracy, and this is so even where statements of a deceased co-conspirator are introduced into evidence. *See, United States* v. *Marchiso,* 344 F.2d 653, 668 (2nd Cir., 1965).

Furthermore, while the cautionary instruction by the court is again not determinative of the question of prejudice, the giving of the instruction reinforces the propriety of the admission of evidence as to acts of the alleged unindicted co-conspirator and alleged admission of implications about the content of conversations with the alleged unindicted co-conspirator.

Although the cases require and Rule 14 of the Federal Rules of Criminal Procedure authorizes a severance where a defendant may be prejudiced by a joint trial, the benefits to the administration of justice which accrue from use of the joint trial should not be gainsaid on the basis of mere unfounded speculation that joint trial prejudices a defendant. Such speculation is all that has been suggested for the court's consideration in this case, both at trial and in the instant petition.

For the foregoing reasons, respondent's motion to dismiss the petition is granted. An appropriate order will enter.

HUBERT L. WILL
United States District Judge

Dated February 17, 1969